

## **REMARKS**

The above amendments and these remarks are responsive to the Office action dated April 14, 2005. Claims 1-26 are pending in the application. Claims 1-26 are rejected. By way of the present amendment, claims 3, 7-9, 17, 19, and 22 are canceled; claims 1, 18, 25 and 26 are amended. In view of the amendments above, and the remarks below, applicants respectfully request reconsideration of the application under 37 C.F.R. § 1.111 and allowance of the pending claims.

### ***Rejections under 35 USC § 102(b)***

Claims 1, 2, 4, 5-7, 9, 11-12, 18, 20 and 22 are rejected under 35 U.S.C. § 102(b), as being anticipated by F.U.N. Place Recipe Box Archives. The Examiner indicates that the disclosed Children's Chocolate Cake Mix recipe fully anticipate the claimed subject matter. Applicants respectfully disagree, and note that the cited Cake Mix recipe clearly requires heating and/or baking in order to prepare the cake.

The Children's Chocolate Cake Mix recites a packaged mix "for Easybake style oven". More specifically, the recipe recites mixing the cake mix with water, pouring the mixture into a baking pan, and baking in a "child's oven, or bake in mom's preheated 375° oven for 12 to 13 minutes." Clearly, the cake mix requires heating and/or baking in order to prepare the cake, where the claimed subject matter includes food formulations preparable by the addition of water without heating and/or baking.

However, in order to more particularly define the claimed subject matter, Applicants have amended claims 1 and 18 to recite food formulations for a target food

item that is a milkshake, smoothie beverage, fondue, or sorbet, where the edible foodstuff is preparable by the addition of water at or below room temperature. For at least the reason that the cited Cake Mix recipe is not disclosed as suitable for preparing a milkshake, smoothie beverage, fondue, or sorbet, Applicants suggest that claims 1 and 18, as amended, are not anticipated by the reference. As claims 2, 4, 5-7, 9, 11-12, 20 and 22 depend from claims 1 and 18, Applicants suggest they are similarly not anticipated by the cited reference.

Claims 1, 2, 4, 5-7, 9, 11-12, 18, 20 and 22 are rejected under 35 U.S.C. § 102(b), as being anticipated by U.S. Patent No. 2,875,309 (Johannes) or 3,862,341 (Johannes).

The Johannes references teach a dry mix for preparing frosted brownies that includes a frosting mix and a dry mix. The frosting mix can be reconstituted, placed in a baking ban, and the dry mix poured over the frosting mix, and the combination baked together (see for example, the '309 patent at col. 1, lines 3-9 and 20-30). As the cited reference discloses a food formulation that requires heating and/or baking, Applicants respectfully suggest the reference fails to anticipate the claimed subject matter. Further, for at least the reason that the cited dry mix is not disclosed as suitable for preparing a milkshake, smoothie beverage, fondue, or sorbet, Applicants suggest that the rejected claims, as amended, are not anticipated by the cited reference.

Claims 1, 3-8, 18-19 and 22 are rejected under 35 U.S.C. § 102(b), as being anticipated by U.S. Patent No. 3,393,074 (Ehrlich). Claims 1, 3-8, 18-19 and 22 are

rejected under 35 U.S.C. § 102(b), as being anticipated by U.S. Patent No. 3,409,442 (Block). Both Ehrlich and Block describe dry mixes for preparing a cake-like dessert. As discussed above, for at least the reason that the cited dry mixes are not disclosed as suitable for preparing a milkshake, smoothie beverage, fondue, or sorbet, Applicants suggest that the rejected claims, as amended, are not anticipated by the Ehrlich and Block references.

Claims 1, 2, 4, 5, 18 and 20 are rejected under 35 U.S.C. § 102(b), as being anticipated by U.S. Patent No. 4,100,308 (Gawrilow). Gawrilow describes a dry mix for the preparation of a pizza-like crust. The crust requires baking in order to be prepared (see col. 2, lines 6-9), where the instant claimed subject matter includes food formulations preparable by the addition of water without heating and/or baking. In addition, for at least the reason that the cited dry crust mix is not disclosed as suitable for preparing a milkshake, smoothie beverage, fondue, or sorbet, Applicants suggest that the rejected claims, as amended, are not anticipated by the cited reference.

Claims 1, 13-14 and 24 are rejected under 35 U.S.C. § 102(b), as being anticipated by Japanese Patent No. JP 58020151 (Meiji Milk Prod Co. Ltd.). The Patent Abstract for JP 58020151 describes a composition that can be made into cheese fondue "only by dissolving in hot water or milk". Applicants suggest that, as amended, claims 1 and 18 recite formulations for edible foodstuffs that are preparable by the addition of water to the food formulation at or below room temperature. As JP 58010151 explicitly requires the

use of hot water or milk, Applicants respectfully suggest that claims 1 and 18 are not anticipated by the cited reference. As claims 13-14 and 24 depend from claims 1 and 18, Applicants suggest they are similarly not anticipated by the cited reference.

Claims 1 and 26 are rejected under 35 U.S.C. § 102(b), as being anticipated by U.S. Patent No. 3,808,730 (Cooper et al.). Cooper discloses a toy oven with a telescopic food mold, used in conjunction with a dry mix for forming a reconstituted cake. For at least the reason that the cited dry cake mix is not disclosed as suitable for preparing a milkshake, smoothie beverage, fondue, or sorbet, Applicants suggest that claims 1 and 26, as amended, are not anticipated by the cited reference.

Claims 1, 16-17 are rejected under 35 U.S.C. § 102(b), as being anticipated by European Patent No. 0619081 (Kraft General Foods, Inc.). The EP 0619081 reference discloses dry mixes for producing quick-setting gels. Applicants suggest that claim 1, as amended, is directed to food formulations for preparing a foodstuff that is representational of a target food item that is a milkshake, smoothie beverage, fondue, or sorbet. Applicants suggest that claim 1, as amended, is not anticipated by the cited reference.

Rejected claim 16 recites a food formulation wherein the target food item is a sorbet. Specifically, the sorbet formulations are manufactured so that upon the addition of water, the formulation creates a foodstuff having a texture and appearance similar to a frozen sorbet-type dessert (see the specification at paragraph 0064). Applicants

respectfully suggest that dessert gels and frozen sorbets possess substantially different textures and appearances. Applicants note, for example, that the EP 0619081 specification emphasizes the importance of gel texture (page 2, lines 34-36), and the clarity of the resulting dessert gel (page 3, lines 24-27). Applicants suggest that the EP 0619081 reference fails to disclose, teach or suggest a food formulation that is representational of a frozen sorbet-type dessert, and that claim 16 is therefore not anticipated by the cited reference.

As claim 17 is canceled, the rejection of that claim is moot.

Claims 1, 3-8, 18-19 and 22 are rejected under 35 U.S.C. § 102(b), as being anticipated by U.S. Patent No. 5,738,900 (Cuadrado et al.). Cuadrado is directed to formulations of sugar, where granular sugar has been treated with a mixture of glycerin and polysorbate. These sugar formulations are disclosed as being useful in dry food mixes. In particular, as disclosed at col. 2, lines 17-19, the sugar formulations are disclosed as useful with respect to instant pudding mixes and hot beverage mixes.

Specifically, the Cuadrado reference discloses dry pudding mixes that are dispersed in cold 2% fat milk (Examples 1 and 2) to produce a chocolate-flavored pudding having a smooth texture and a glossy surface. The Cuadrado reference further discloses a dry coffee mix formulated for dissolving in hot (at least 82 °C) water to produce a hot coffee beverage.

Applicants first suggest that the reference fails to disclose a dry mix for an edible foodstuff preparable by the addition of water at or below room temperature. Applicants

further suggest that both pudding and coffee are distinct from milkshakes, smoothie beverages, fondues, and sorbets in both texture and appearance. Therefore, the reference fails to disclose, teach or suggest a food formulation as recited in claims 1 and 18, as amended.

In view of the above amendments and remarks, Applicants respectfully request that the rejection of claims 1, 2, 4-6, 10-14 16, 18, 20, 24, and 26 under 35 U.S.C. § 102 be withdrawn.

**Rejections under 35 USC § 103(a)**

Claim 15 is rejected under 35 U.S.C. §103(a) as being unpatentable over Meiji Milk Prod Co. Ltd. The Examiner suggests that JP 5802151 discloses a powdery or granular composition which is reconstitutable by the addition of hot water or milk to provide a cheese fondue, and that it would have been obvious to one of ordinary skill in the art to provide a food formulation that includes dippable ingredients for dipping into the foodstuff. Applicants respectfully disagree, and suggest the Examiner has failed to establish the *prima facie* obviousness of the claim.

As discussed above, claim 1 as amended recites formulations for edible foodstuffs that are preparable by the addition of water to the food formulation at or below room temperature. As JP 58010151 explicitly requires the use of hot water or milk, Applicants respectfully suggest that the cited reference fails to provide each and every element of the claim. Additionally, the cited reference teaches away from the claimed invention, in that

the reference explicitly teaches the use of hot water, not water at or below room temperature, and the reference teaches a savory cheese-based fondue. One of ordinary skill in the art would not be motivated by the JP 58010151 reference to dip either marshmallow candies or edible gelatin candies in the cheese fondue.

The Examiner indicates that in Applicants' claims, the fondue is generic, which can include savory or sweet fondue, and that this provides motivation to modify the teachings of JP 58010151. However, this is an improper basis for formulating an obviousness rejection under 35 U.S.C. § 103. An assertion that the Applicants' own invention provides the necessary teaching, suggestion or motivation to modify the prior art is the very essence of hindsight reconstruction.

In order to properly establish *prima facie* obviousness, the suggestion or motivation to modify the teachings of the reference must be found in the prior art itself. Further, there can be no such suggestion or motivation where the modification changes the principle of operation of the reference, or renders the cited reference unsatisfactory for its intended purpose. In this case, the savory cheesy fondue mix of the cited reference must necessarily fail to provide a suggestion to include marshmallow candies and edible gelatin candies as dippable ingredients.

In view of the above amendments and remarks, Applicants respectfully request the withdrawal of the rejection of claim 15 under 35 U.S.C. § 103.

Applicants have previously provided an Information Disclosure Statement under 37 C.F.R. §§ 1.56, 1.97, and 1.98 on August 13, 2004. However, the Applicants have not received an indication that the disclosed references have been considered.

Applicants hereby provide a copy of the PTO-1449 form previously submitted, for the convenience of the Examiner, and respectfully request a confirmation that the disclosed references have been considered by the Office, and will be made of record in the above application.

It is now believed that the subject patent application has been placed in condition for allowance, and such action is respectfully requested. If the Examiner has any questions or concerns, or if a telephone interview would in any way advance prosecution of the application, please contact the undersigned agent of record.

The Commissioner is hereby authorized to charge any additional fees which may be required, or credit any overpayment to Deposit Account No. 11-1540.

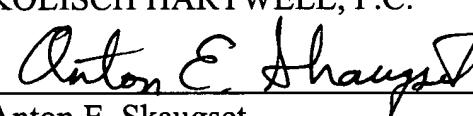
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I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail, postage prepaid, to: Mail Stop Amendment, Commissioner for Patents, P.O. Box 1450, Alexandria, Virginia 22313-1450 on September 9, 2005.

  
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